CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. JUNE TERM, 1815.

BUJAC & AL. vs. MAYHEW.

No bill of exception lies to a final judgment.

MATHEWS, J. delivered the opinion of the Court. The appellees, who were plaintiffs in the Court below, commenced suit to recover a negro woman mentioned in their petition, claiming title under a public act of sale from A. Dufour, executed before a Notary in the Parish of Baton Rouge, in the manner prescribed by law; stating, that she is in the possession of Mayhew, the appellant, and that he refused to deliver her to them on their request and demand.

THE defendant in the District Court answers generally, by denying all the facts contained in the petition. Thus resting his title on possession alone; which, if legal, is *primâ facie* evidence of a title.

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THE manner in which this cause is brought up, is so informal, as to make it difficult to understand it. There is no regular appeal from the final judgment of the inferior court: no statement of facts in the record, nor any thing acknowledged by the parties to be an equivalent; but in the bill of exceptions the opinion of the Judge, on the evidence offered by the plaintiffs (not objected to by the defendant as improper) received by the Court and forming the basis of its final judgment is excepted to! If this bill of exceptions proved no farther, it could be considered in no other light than an exception to a final judgment, which, the Court would be thus called on to reverse or affirm; yet by law we can only affirm or reverse the final judgments of the inferior tribunals, on a statement of facts, something equivalent or special verdict of a jury. Exceptions cannot regularly be taken to a final judgment, the only remedy is an appeal in the form prescribed by law. By divesting the bill of exceptions of this informality, it remains properly an exception to the opinion of the Judge in refusing the testimony offered on the part of the defendant, and as such alone it must be examined. If the appellant intended to rest his defence on his possession of the property, and the weakness of the appellee's title, as not having been legally made out, he ought to have moved the Court for judgment. On a final judgment being rendered, either party might have appealed in due form, and the legality

of the title of the appellees, could then have been determined, on a view of all the facts and law appertaining to the case. But in attempting to shew title in himself, derived from the same person under whom they claim, the identity of the slave is acknowledged and also the right of Dufour; this much is admitted by the very offer of the testimony on his part, which was rejected by the Judge; unless this evidence is to be taken as relating to some other negro woman not in dispute between the parties: which would be absurd, because then it could have no application to the cause. Let us now see what this evidence is, which the Judge rejected. The first testimony offered by the appellant was intended to prove the sale of the negro woman in dispute, by an Auctioneer under an execution issued on a judgment obtained before a Justice of the Peace, by virtue of which she was seized by a Constable, as the property of one Parent. 2ly. He offered to prove a title in said Parent by an act of sale, under private signature, from Dufour to him, and also the loss of said instrument. And 3dly. the payment of the money to Parent, above what was necessary to satisfy the execution under which she was sold. It may be laid down as a general principle of law, that a purchaser, under a Sheriff's or Constable's sale, made in virtue of an execution, gets no better title to the property sold than was held by the defendant in execution; and consequently, the proof of the sale by the

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Auctioneer, on the present case, would only shew the legality of the appellant's possession, which is not disputed: the suit of the appellees being not a possessory action, but one in which they are bound to make out their right and title to the property, against all persons. This part of the evidence is, therefore, useless and was properly rejected by the District Judge: it may be added that to complete this evidence, they ought to have produced the judgment on which the execution issued. The private act of sale from Dufour to Parent, which was never recorded agreeably to the provisions of the Code, cannot affect the interest of the appellees who claim under the same person, by an other act legally executed, unless it could be shewn that there is something fraudulent in the transaction on their part. This is not done, nor has it been pretended by the appellant that he is in possession of any such proof. This evidence was therefore with equal propriety rejected by the judge below. The third kind of evidence offered is so totally irrelevant to the case, that the District Judge certainly did not err in refusing it. Upon the whole, we are of opinion that the bill of exceptions to the opinion of the District Judge must be overruled and as the cause stands before this Court, solely on the exception taken to the Judge's opinion in rejecting testimony, the appeal must be dismissed.

It is, therefore, ordered, that the appeal in this case be dismissed at the appellant's costs.

LAVERTY vs. *GRAY AND TAYLOR.*

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Juror, who has given an opinion, rejected, though he swears his mind is still open to conviction.

MARTIN, J. delivered the opinion of the Court. This case comes up, on a bill of exception, to the opinion of the Court of the first district, overruling the objection of the plaintiff's counsel, to the swearing of Ogden as a juror, on the ground that "he was *consulted as a friend* "(by Bell, the agent of the defendants) in the "transaction, previous to the suit being institut-"ed, and from the case, as it had been represent-"ed to him, by the said Bell, he had given his "opinion, founded on the evidence, as far as he "had heard it, that the transaction was a fair one, "and that the defendant was entitled to the pro-"perty in dispute." These facts, were disclosed by the juror, who added, that, "as he had heard "only one side of the question, his mind was still "open to conviction from law and evidence."

IT has been contended that the juror was properly sworn, because, as there was no evidence of the facts on which he was challenged, except what was contained in his declaration and he had sworn away the presumption of the existence of any bias on his mind, and as the whole declaration must be taken together, there remained nothing from which his incompetency might be presumed. He best knew the situation of his mind, it is said, and he swore it was *totally unbiassed.*

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2. BECAUSE the opinion he gave was qualified: it being declared to be founded on the sole evidence laid before him.

3. BECAUSE the opinion he gave was not of the truth of the facts of the case, which it was the province of the jury, sworn in this case, to try, but on the law arising thereupon, in which the jury were sworn properly to be directed by the opinion of the Court.

4. BECAUSE the challenge, being *to the favour* and *not* a principal challenge, the competency of the juror was not to be tested by the Court, but pronounced upon by *triors*.

THE counsel has relied on the opinion of the circuit court of the U. S. for the Virginia district, in the case of the *U. S. vs. Burr*, on a motion to discharge Eggleston. This juror informed the Court that, "after having read the deposition of "General Eaton against the defendant, he felt his "mind so warm, that it would not be proper for "him to attend as a juror; that he spoke what he "felt in public companies, and these were his im-"pressions from what he had *then* read; but "what he had read *since* on the case had left him "so far relieved from prejudice, as not to be able "what to say." Being asked whether he had *now* an opinion formed? he answered that, "if no "other information should come to his view, it

"might be said that he had not." On this he was sworn. 1. *Burr's trial, Chap. ed.* 11 & 12.

WE are of opinion that the District Court erred in receiving the juror.

A challenge on account of a *suspicion of bias* is a challenge *proper affectum*. 3 *Comm.* 363. A legal *presumption of bias* arises when the juror has had a *previous knowledge* of the cause, by being one of the witnesses to the deed. *Co. Litt.* 157 *a*: or, if he have been *informed of*, or treated of, the matter; this is a *principal* challenge. The case, cited by the counsel, shews that the Court is to decide on the state of the juror's mind, according to *legal* presumption; maugre he swears, as Eggleston, that "it would not be proper for him to attend as a juror" or as Ogden, that his mind is still open.

THERE is nothing in the circumstance of the juror having qualified his opinion, by asserting it was founded only on the evidence laid before him; this being the natural presumption.

THE forming and disclosing an opinion on the question of law, which is to determine a transaction, is equally fatal to the competency of a juror, as on the facts. Where the juror had expressed his opinion on the *legality of a toll*, claimed in the suit, he was not suffered to be sworn. *Blake* vs. *Millspaugh*, 1 *Johns.* 316.

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APPLYING these principles of law to the present case, Ogden ought not to have been received as a juror, because he had a *previous knowledge* of the case, had been *informed of*, and *treated* of the matter, that is spoken with about it by one of the parties; this, in the eye of the law, raising a presumption or suspicion of a bias, which ought to have excluded him. He could not restore himself to his competency to act as a juror, by his assurance on oath that he was still open to conviction. Few men are conscious of the influence of the prejudice which avowed opinions create. As it is the duty of every juror to soar above it, the law doubts not the intention of any juror to resist it. But, as men are liable to mistake *desires* for *opinions*, it does not allow the assurances which a juror gives of his opinion or belief (for he can only swear to this) that he is above all prejudice, for perhaps this is to be above human nature.

THE present case differs materially from that in Virginia. Eggleston declared that the reading of one paper had given rise in his mind to impressions very unfavorable to the defendants; he had published these sentiments; but, information, which he had afterwards received, had eradicated these impressions, so that he had no *opinion formed*, when he came to the book. Ogden had formed and published an opinion, which for any thing that appears on the record, induced the bringing of the suit, and as he had not heard any thing far-

ther on the subject, the presumption was that the opinion was unshaken, when he was called. It is true he owns that as he heard only one side of the question, his mind is still liable to conviction, from law and evidence; that he wishes, intends, and indeed expects it would be so, is that what the Court were bound to believe, without as well as with this assertion: yet it ought not to have been considered as destroying the legal presumption, which repelled him from the book.

THERE must ever be a natural propensity in a juror thus situated, to listen with complacency to arguments confirming the opinion he has given, while contrary ones, suggesting his fallibility, must give rise to opposite sensations. The counsel who best pleases, will best convince; the juror will be glad to find himself able to give a verdict that may confirm the opinion of his wisdom, in the person whom he advised; if the scales happen to vibrate a while his wish may fix them.

IT is ordered, adjudged and decreed that the judgment of the District Court be annulled and reversed and that the cause be remanded with directions to allow a new trial.

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DERBIGNY, J. delivered the opinion of the Court.* From the value of the matter in dispute and the variety of questions raised for the consideration of the Court, this case has assumed more importance than it would otherwise have derived from any difficulty attending its decision.

If A. buys land for B. he cannot rescind the sale, without B's. consent.

WHILE the parties were partners in trade, the plaintiff bought a certain tract of land, first by an act under private signature in the name of the firm, and afterwards by a public act purporting in the body of it to be a purchase on his own private account, though signed by him in the name of the firm. A liquidation of the business of their concern being afterwards sued for, by the defendant before the Spanish Governor of Baton-Rouge, within whose district their commercial house was established, a course of proceedings was there had, during which the land in question was adjudicated for the appraised value to the defendant, now the appellant.

THE first question, therefore, to be disposed of is whether this adjudication ought to be considered as *res judicata*; and first, before any enquiry into its validity, whether the judgment rendered in that case is final or still open.

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

THE history of that suit, which it must be confessed exhibits a strange scene, has nothing to do with the investigation of this point, and will be kept out of view until it is decided. Neither is it necessary for its decision to search into the Spanish judiciary system, in order to ascertain what was the judicial power of the Governor of Baton-Rouge. Whether Governor Grandpre's judicial authority was inherent to his office, or delegated to him by the Governor-General of Louisiana, who had by law a right to appoint delegates, is a matter of no consequence. It ought to be deemed sufficient that he exercised a jurisdiction under the eyes and controul of his superiors. We are bound to presume, where the contrary is not proved, that he acted with due authority.

ON the 20th of August, 1803, Governor Grandpre rendered his judgment confirming a report of referees, which after having charged the appellant with the full value of the land now in dispute, established a balance in his favor. This judgment was notified to the appellee on the 27th of the same month, and on the 30th he presented to governor Grandpre a petition, in which he complains of the award, and *begs leave to bring the whole case before the Superior Court sitting at New-Orleans.* Here then is an appeal in substance and in words, claimed within the legal delay: So that supposing this to have been a definitive

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sentence, it is regularly appealed from. But, it was not a definitive sentence, from Governor Grandpre's own shewing: for to this petition to appeal he answers, that the appellant "having not "yet seen the final settlement of the accounts, "cannot say whether he is injured, and that if up- "on receiving communication of that final settle- "ment he discovers any error in it, he will be at "liberty to point them out, in order for the "Court to determine as justice may require."

THIS last decree amounting to a denial of the appeal at that time, the appellee, unwilling to proceed any further in that Court, came directly before the superior of Governor Grandpre with a memorial stating his grievances, and a decree ordering some of the documents annexed to his petition to be translated, shews that his complaint was admitted. Since then nothing appears to have been done in the suit, so that if Governor Grandpre's decree was not final as he himself seemed to consider it, the case remained opened in his Court; and if it was final, it remained open in the court of the Governor-General of Louisiana by virtue both of the petition of appeal, and of the application of the appellee there. In either case we must say that the decree of Governor Grandpre cannot be considered as having the force of the thing judged, and is consequently no bar to the appellee's claim.

THIS precludes the necessity of examining how far the Courts of this state may enquire into the validity of judgments in any other manner than that which is established by the laws organising those Courts; in other words, whether the Spanish system, according to which certain judgments not appealed from may be declared null and void, is yet in force in this country.

DISMISSING, therefore, that question, we now come to the merits of the case. Is the land here claimed the property of the appellee alone, or the joint property of him and his partner?

BY a private bill of sale dated September 29th 1799, the appellee bought the land in dispute for the account of the partnership in the absence of his partner. Under that title he took possession of the land and proceeded to improve it. But having received (it does not appear when) a letter from his partner, dated Cincinnatti, the 19th August of the same year, in which he told the appellee not to engage any land for him, the appellee, on the 25th of March 1800, caused the vendor of the land in question to make him a public act of sale of it in his separate and individual name. Upon this last act he claims title as the sole purchaser of the land.

IN support of this claim he alledges, that by the articles of the co-partnership, entered into between him and the appellant John Smith, no right

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was given him to purchase real property for the account of the firm; that the purchase by him first made without authority could not vest any right in his partner, until he should accept it; and that the appellant having signified his intention by letter not to acquire any land in that part of the country, before the purchase had taken place, he must be considered as having refused to ratify the bargain. To the aid of this letter, several witnesses were called, who deposed that the appellant, on his arrival in the district of Feliciana in April 1800, expressed his disapprobation of the purchase of the land in contest: some affirming he said he would have nothing to do with it, others that he spoke of the purchase as unnecessarily involving the partnership in debt.

THE first fact to be ascertained is whether by the articles of copartnership the appellee was authorised to purchase for the firm any other property than that which is usually received in payment of merchandize sold. A phrase in those articles has been tortured to make it signify that the appellee had such a right. It is this: "the "said merchandize shall be sold to the best ad- "vantage for cotton or *other commutable ar-* "*ticles*, or cash, as the acting partner may in his "judgment deem advantageous." The words commutable articles, it is said, must include every thing that may be the object of commerce, and of course real property as well as any other. But

stretching that expression to the full extent given it by the appellant, it would at best signify nothing more than that the appellee could receive lands in payment of merchandize, which is very different from that of buying lands *on credit, for cash.* The authority of the appellee, as derived from the articles of copartnership, was limited to the sale of the merchandize for cash, or cotton, or other commutable articles ; but when thus converted, he had no right to dispose of the proceeds to buy real property with them. The doctrine contended for by the appellant, that in a commercial partnership purchases made by one of the partners, under the signature of the firm, are binding on the others, may be very correct ; and yet it by no means follows that a partner has a right to bind the firm in every sort of acquisitions. In a commercial partnership all the mercantile transactions of one of the partners are binding on the others ; but it would be monstrous to make them answerable for any act out of the course of trade. A partner must be considered as vested by his copartners with certain powers, for certain purposes. If he travels out of those powers, his acts cannot be more binding on the others, than the acts of an attorney who exceeds his powers are obligatory on his constituents.

By the articles of copartnership, then, the appellee had no right to buy real property for the firm. Yet he did so : What is to be the conse-

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quence? It is not disputed that when a man undertakes to buy a thing for another without authorisation, the person for whom the purchase is made may avail himself of it; but it is said that such person does not thereby acquire any right before he accepts the purchase; and that in the mean time it is in the power of him, who has bought in the name of the other, to cause the contract to be cancelled. Of this particular question we have not found any express solution; but it does appear to us that the principles which regulate the conduct of the *negotiorum gestor* generally shew that he can have no such power. One of those principles is, that the person who has once undertaken the management of the business of another, is no longer at liberty to abandon it: *a fortiori* must it be said that, when he has done an act for the benefit of that other person, he shall not be at liberty to destroy it—(1 *Domat*, *book* 2, *tit.* 4, *sect.* 1, *art.* 1.) Again, when the *negotiorum gestor* has without necessity bought something for another, the risk is his and the profit is anothers. (*same sect. art.* 4.) The other then acquires a right: he from thence becomes entitled to the advantages resulting from the purchase, and the *negotiorum gestor*, who is not at liberty to abandon his interest, surely cannot by a contrary act deprive him of that benefit. But it is asserted that in this case the appellant, John Smith, refused to ratify the purchase. To prove

that, a letter is produced in which the appellant recommends to the appellee not to engage any land for him. That letter, however, which is dated about six weeks anterior to the purchase, cannot be considered as containing a refusal to ratify a bargain, which did not exist. After this recommendation he was still at liberty to accept or to refuse a purchase made in his name. The contract which the appellee had undertaken to make for the benefit of the appellant could no be destroyed by himself before the pleasure of the appellant was known touching that identical acquisition. So that supposing the letter here produced to contain the prohibition which the appellee contends for, still he ought to have waited for the answer of the appellant on that particular subject. But this letter is not what the appellee endeavours to make it. A recommendation not to engage any land for John Smith is not a prohibition to buy lands for the partnership. Taking the whole content of this letter, together with some passages in the letters of the appellee, there is every reason to believe that John Smith had previously manifested an intention to settle in the Bayou Sarah District, and had given his partner some instructions to that effect, which instructions he afterwards revoked in these words: "Don't absolute-
"ly engage any land for me in that country, as I
"wish to reconnoitre a little more generally through
"the country than I have."

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THIS letter, then, is by no means a sufficient voucher of John Smith's refusal to abide by the purchase of the land in dispute in the name of the partnership. As to the conversations which he had with other persons touching that acquisition, it cannot be seriously contended that they amount to a renunciation of his rights. Besides they have nothing to do with the motives which induced the appellee to cause a second sale to be made in his private name, for that was already done when those conversations took place.

ADMITTING, therefore, the purchase made by the appellee in the name of the partnership to be nothing more, with respect to the share of John Smith, than a purchase made by a person having no authority to buy, his right to accept it stood unimpaired, when the appellee undertook to destroy that sale.

BUT the appellee, although by the articles no power was given to him to acquire for the partnership other property than that which he was to receive in the course of his trade, cannot be deemed to have been entirely destitute of any authority to act as he has done. Independent of any written stipulations, a partner, like a proxy, may be considered as tacitly vested with a discretionary power to do all things necessary to enable him the better to carry on the business which he has to manage. If the partner is in the situation of a proxy with respect to his right to bind his partner

the following principle may be applied to him. "The attorney is himself bound by the contract "which he enters into as such, when the contract "is not made by order of his constituent, nor for "his utility; but if it is made by order of the con- "stituent, or *for his utility though without order*, "it binds him, and not the attorney." *(Curia Philip. tit. Factores, No. 32.)*

In this case it is evident from the conduct and correspondence of the appellee that there existed between the parties some understanding as to the exercise of such discretionary power. The principal produce for which they could sell their goods was cotton; it was more profitable to buy it in the seed, hence the propriety of establishing a gin: hence the necessity of buying a place whereon to build it. The appellee bought on very moderate terms a tract of land advantageously situated, where a store could be kept and a gin be erected. He bought mules to work at the gin; he bought a slave for the service of the store, and actually improved the place with the funds of the partnership. Had he no power or authority to do all this? If that power and authority can be denied, surely it is not by him, whose conduct evidently shows that he considered himself as sufficiently authorised for those purposes.

Upon the whole we are of opinion, that under the private sale of the land in dispute in favor of

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the partnership, J. Smith acquired a right to an undivided moiety of the land; that he has done no act by which he can be considered as having divested himself of that right; that the subsequent public act of sale of the same land could not destroy, and has not destroyed, that right; and that, as between the parties, it is a mere nullity, unless it is received as a confirmation of the private act.

IT is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that judgment be entered for the appellee for one undivided moiety of the land by him claimed.

Duncan and *Livingston* offered the following argument for a rehearing.

To shew that the plaintiff could legally cancel the contract of sale under private signature from Duplantier to R. Kemper & Co. and receive in return a sale of the land to himself individually, he begs leave to make the following points:

I. No man can contract for another, unless he be authorised so to do. Kemper and Smith were partners, but this contract of sale was out of the partnership concern, therefore there could be no authority thence for the contract, and no other authority is pretended; therefore, the act itself, so

far as related to Smith, was nugatory and void, and no right could accrue to any person whatever from it.

II. A MAN in contracting for another without obligation so to do, or any authority whatever from the other, cannot affect the interests of the other; nor can he bind himself thereby to the other, for it is a mere voluntary act, and *ex nudo pacto non oritur actio*; see *Powell on Contracts*, 338 *to* 348: *Pothier on Contracts*, 5, which if it were binding, might be revoked as long as it remained unaccepted.

III. THAT the defendant, Smith, could only avail himself of his purchase while the contract remained in existence: for he might make that *his contract* which was not *his previously*, but Kemper's; the plaintiff not having been obligated to purchase for Smith, incurring no obligation either to keep the contract opened for Smith's acceptance; having annulled it, Smith cannot then avail himself of it. His right is not destroyed, for he had none. Suppose a right, where was the remedy? Not against the vendor, for Smith was not bound, and there existed no contract between him and the vendor; not against the plaintiff, for he neither was bound in law nor conscience to buy for Smith, or to hold for him.

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IV. THE plaintiff was therefore at full liberty to countermand what he had done without authority; while it was merely his act and before it was made the act of Smith; for the purchase being merely his voluntary act, he had the same controul in dissolving that he had in originating it. The act did not divest any, there was no, interest vested in Smith, for his contract was wanting, there being no assent. 1. *Powell on Contracts*, 8, *actus inceptus cujus perfectio pendit ex voluntate partium revocari potest;* see 1. *Fonb. in Equity*, 158, and a voluntary act, even if it was a gift (a stronger case than the present) is countermandable before acceptance or assent; 1 *Strange* 166.

V. BUT in this case, the dissent of Smith was fully expressed. Smith's letter to the plaintiff, dated 25th August, 1799, although the writer does not apply it to any particular purchase, is clearly applicable to all purchases. There is no peculiarity in the purchase of the land in question that could distinguish it. A caution beforehand not to buy, is a dissent to all purchases; and his reasons for dissenting existed for all, and applied equally for any; he wished to realize all the partnership's funds to make remittances to Philadelphia, to put the concern in such situation as to be closed, if he thought proper. Immediately on his arrival, he gives preparatory notice to dissolve, he expressly tells the plaintiff to make no further purchases from

Philadelphia of goods, he says the same thing of lands, and notwithstanding the idea entertained that this refers to separate lands it appears from a view of the whole subject to embrace all purchases.

1. FROM the design and spirit of the letter, which would controul any restricted meaning of words loosely used.

2. FROM Smith's own construction of this letter, as appears from the testimony of Col. Baker, of James Williams, and of J. H. Johnston.

3. FROM the plaintiff's construction of this letter at the time he received it, as appears by the testimony of James Williams, J. H. Johnston, Lilly and Duplantier.

4. FROM Duplantier's construction of this letter. It is, therefore, fair to understand this letter as all the parties did at or about the date of the transaction growing out of it. If it were doubtful whether the impressions this letter made on the plaintiff conveyed Smith's intentions respecting this purchase, Smith's frequent declaration of his dissent, in the presence of many witnesses, would remove that doubt and shew his mind fully on the subject. It will, therefore, follow from the testimony that the plaintiff in annulling the first purchase did so with the fair and honest motive of satisfying Smith. If he did consider himself authorised, previous to Smith's letter, his opinion was so far changed afterwards as to induce him to undo what he had done, to re-

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move all causes of complaint, by taking the purchase on himself.

VI. But the plaintiff is viewed in the light of an agent; how he could be an agent for Smith, in the purchase of land for the partnership, is not conceived; he was then, if at all, an agent for the partnership, but the partnership did not extend to land purchases; his agency in the partnership is defined in the articles. As a partner he is a principal and no agent. *Watson on P.* 2. He is not constituted the agent of Smith, nor of Kemper & Co.; if he were the agent he would bind his principal, for if in the purchase he contracted as agent, it was not in his own name, but for Kemper & Co.; see *Pothier on Contracts* 334, "it is not he, the agent, that contracts, but his principal," and yet in this case his principal, (if any) was not bound, and therefore could not have contracted. Besides, if he were an agent to make the purchase, he was also an agent to annul it; for an agreement may be waved with the concurrence of the parties, *Powell Contracts*, 412 (and we may add) or their agents. A case is cited shewing that "no "person, who undertakes the management of the "business of another, can abandon it." Does this mean any thing more than that he who engages as an agent shall not neglect the business of the principal? or that a person who even voluntarily undertakes shall not occasion injury to the

person whose business he manages? as in *Powell on Contracts*, 364 *to* 369, when injury, occasioned by neglect on an officious undertaking, makes the undertaker liable, and see the case of Coggs vs. Bernard, mentioned in Powell. Altho' I am prohibited from doing an injury, I am not compelled to do a service or benefit. This is the only case that can be brought to make the plaintiff an agent, yet it cannot apply, for 1st. he occasioned no injury: 2d. he did not undertake to manage Smith's business, nor the business of the partnership in any other manner than as a partner.

The other case cited from Domat, is where "an agent has bought for another." This applies to a *constituted* agent. If his transactions are gainful, the benefit must result to his constituent; if he act with a certain degree of imprudence, he must suffer for it. This cannot apply to a person who is under no obligation to act for another.

VII. But although, as a partner, the plaintiff had no right to bind the firm, and of course none to affix its signature: although he be not the agent of Smith, nor of Kemper & Co. still it is contended that the plaintiff, as a partner might extend his powers as such by adding to them those of a proxy or attorney. If he had discretionary powers, they bound the partnership; that

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they do not is the opinion of the Court. If his powers only extend to binding himself they are not those of an attorney. If the other partner is bound by every act of his copartner which is "for his utility" then indeed one partner is agent for the other, not only in the partnership concern but universally, and provided the act is *at the time* advantageous, whatever subsequent events may occur to effect a change; the other is bound *nolens volens*: with such an absurdity growing out of this principle it cannot surely be applied to a partner.

VIII. THE law relating to the *negotiorum gestor*, is regulated by positive statute, *5th part.* 12, 26; it relates only to cases where there is some business in which the principal has an existing interest, and to the same effect is *Pothier*, 168; there must be an affair in which the principal is interested: the *negotiorum gestor* cannot *create one* for his principal without his knowledge, for this conclusive reason that by 5, *Partid. tit.* 12, *law* 20; the *negotiorum gestor* has an action against his principal for his disbursements and expences, if *bona fide* incurred. Now, it would be monstrous to make a man pay the price of the land, or the expense of conveying it, wherever an officious friend might think it for his interest to make a purchase for him.

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KEMPER vs. SMITH.

IX. SUPPOSING Kemper to have a right to purchase for Smith, subject to his ratification, as the parties agreed that the sale should be completed before a notary, until this was done, he had a right to rescind the agreement, 5 p. 5, 6.

X. IF Kemper's purchase continued to the benefit of Smith, it could only be from the time of his ratification, because there was neither express nor implied authority, and in the intermediate time he had the same right to rescind that he had to purchase.

XI. IF a decree should be given in favor of Smith, for the one half, as the legal title is in Kemper, he ought not to be divested, but on a full and final settlement, and payment by Smith of all what he owes to Kemper on their partnership account.

THE Court allowed a re-hearing: but required counsel to confine their arguments to the following questions.

1. WHETHER a person, after having created an interest for another, can destroy that interest, before the other has signified his refusal to accept it?

2. How far a partner may bind his firm in contracts which, though not contemplated by the articles of copartnership, are entered into for the utility of the firm and for the better management of its business? *Postea, vol.* 4.

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HARANG vs. DAUPHIN.

HARANG vs. DAUPHIN.

THE plaintiff had brought suit for a trespass on his land, praying that one thousand dollars be allowed him for the injury he had sustained; and obtained a verdict and judgment for $170, in the Court of the Parish and City of New-Orleans. The defendant prayed an appeal, which was denied him, on the ground that the sum recovered was under $300. On an affidavit of these facts *Duncan* moved for a *mandamus* to the Parish Judge commanding him to allow the appeal. The *mandamus* did issue, and the appeal was allowed. See the case, *vol.* 4.

An appeal lies, tho' the sum recovered be under $300 when that sued for is above.

KRUMBHAAR vs. LUDELING.

MATHEWS, J. delivered the opinion of the Court.* Suit was brought in the Court below by the appellant, on a bill of exchange drawn by the appellee in his favor, on F. & H. Amelung, which was accepted by them, payable at the Bank of the U. S. in Philadelphia; and was afterwards protested for non payment. The insufficiency of the protest and want of regularity in the notice to the drawer as required by law, have been insisted on by his counsel, before this Court, as exonerating him from any obligation to pay the bill. It does

Drawer of a bill may shew he drew it as agent.

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

not appear, from the record of the proceedings in the District Court, that any opposition on these grounds, was there made to Ludeling's liability on the bill of exchange; and from the evidence in the case, which we are compelled to examine and weigh in order to ascertain the facts (no statement having been made in pursuance of the act of the legislature) it is our opinion that in respect to these things, due diligence has been observed by Krumbhaar the holder and payee of the bill, and consequently the drawer cannot on this account be exonerated.

During the progress of the suit in the Court below, the parties, in conformity with the statute regulating the practice of our courts, have, on various occasions, resorted by interrogatories to each other for evidence, and the opinion of the District Judge, to regulate their answers, has in several instances been required, and when given, as often excepted to by the counsel in the cause. Although we do not consider these opinions and exceptions to be very important, in the decision of the case, yet it may be proper briefly to observe that, in our opinion, the Judge has not erred in them.

At the trial of this cause, several questions of law were made and offered by the counsel of the appellee, requiring the opinion of the District

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Court, which comprise the legal merits of this case. 1st. Whether a person, acting in the avowed character of agent, is liable personally? 2d. Can it be proved by parol or other evidence that the defendant (here the appellee) signed the bill of exchange as agent, when the agency does not appear on the bill; but the plaintiff had knowledge of his being such? 3d. There being a variance between the bill as stated in the petition and the bill produced in evidence, (viz.) the former being *for value received* and the latter for *value* as advised; is not the variance fatal?

I. THE first of these questions involves no difficulty; and has been properly solved by the Court below. "A person acting avowedly as agent, is not liable personally" for any act legally done in his capacity as such.

II. To decide on the second question it becomes necessary to enquire a little into the nature of contracts originating in bills of exchange (as laid down by the law merchant) which is said to be "a system of equity founded on the rules of equity; and governed in all its parts by plain justice and good faith." A bill of exchange forms a written contract, carrying with it evidence of the consideration on which it is founded and it is scarcely ever necessary, that a plaintiff in an action on it should prove that he gave a consideration; and in

no case is it open for the defendant to prove that he received no consideration, unless in an action, brought against him by the person, with whom he was immediately concerned in the negociation of the instrument. Thus between the drawer and acceptor, and the drawer and the payee, the want of consideration may be questioned.

A BILL of exchange, forming a written contract between the drawer and payee, which creates an obligation on the former, to pay the amount, provided the latter uses legal diligence to obtain payment from the person on whom it is drawn; and fails to get it, according to a general rule of evidence, no parol testimony can be admitted to prove any contract different, from that made by the bill itself. But this rule does not preclude enquiry into the consideration, as in the present case, between the drawer and payee.

THE attempt of Ludeling to shew that he acted merely as agent for the Amelungs, in drawing the bill on which this suit is commenced, can be considered properly in no other light, than an offer of evidence to shew a want of consideration, in the written agreement, and that for this reason he is not bound to fulfil any obligation, which might otherwise have resulted from it. There is no doubt of the personal liability of the drawer of a bill of exchange who signs it without expressing his agency, when it passes into the hands of third persons, having no knowledge of the circumstan-

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ces under which it was drawn; and between whom and the drawer, the law will not allow the consideration to be enquired into. The appellee having signed, without expressing for whom he signs, is clearly liable on the face of it. But he is at liberty to shew a want of consideration, and any circumstances of fraud or violation of good faith on the part of the appellant, which may be sufficient to exonerate him, from this apparent liability; the suit against him, being brought by a person "with whom he was immediately concerned in the negociation of the instrument."

If then Ludeling shews that he was a mere agent for the Amelungs throughout the whole of this transaction, and that within the knowledge of Krumbhaar, the bill is not binding on him, because he is not a party to the contract and as it relates to him it is without consideration; and the attempt, on the part of the appellee to enforce it, is a violation of that evident justice and good faith, which ought to direct and govern in all contracts.

III. As to the third question, it may be observed that the bill of exchange making a part of the plaintiff's petition, we are of opinion that the Judge of the District Court did not err in admitting it in evidence, as the admission of it does not violate the rule, which requires that the *allegata & probata* must agree.

IV. To the only question, now remaining in the cause, which is one of fact, the verdict of the jury answers so correctly that we deem it unnecessary to go into any analysis of the testimony, as the general tenor of the evidence completely supports it: for it cannot be doubted that Ludeling acted solely as agent in drawing the bill.

It is, therefore, ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

Ellery and *Smith* for the plaintiff, *Duncan*, *Livingston* and *Robinson*, for the defendant.

Authorities cited *Chitty* 87, *Lex Merc* 620, 1 *Bos. & Pul.* 652. *Walwing vs. St. Quintin*, 2, *T. R.* 718, *Rogers vs. Stephens* 1 *Caines* 157. *Hoffman vs. Smith*, 7 *Mass. T. R.* 452, *Warden vs. Tucker* 1. *Pothier* 146, 157, 1 *T. R.* 408, *Buckerdike vs. Bollman. Max. Pock. Dict.* 27, 102, 103, *Chitty* 27. *Comyns on Contracts* 252, 253. 5 *East.* 148 *Appleton vs. Bisks*, *Comyn's Dig. verbo Attorney* C. 19. 1 *East.* 434, 2 *Id.* 142 3 *Esp. Rep.* 266. 1 *Pothier on Obligations* 55, 2 *Dallas* 223, *Peake's Ev. (Am. ed.)* 165.

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SEGHERS vs. SYNDICS OF PHILLIPS.

SEGHERS vs. SYNDICS OF PHILLIPS.

A suit against Syndics, on a rule of Court, fixing the attorney's compensation is not a Friday cause, in the Parish Court of Orleans.

MARTIN, J. delivered the opinion of the Court. The plaintiff states that by a rule of the Parish Court of New-Orleans, the syndics were ordered to pay him $458 for his expenditures and services, as attorney of the estate, liquidated by the Court; that they have funds in hand, and have neglected to file a tableau, or statement of the affairs of the estate, as they were ordered to do, by a rule of Court, whereby they have become personally liable.

THE answer contains a general denial and alleges that the orders of Court referred to are *ex parte*, irregular, illegal and void.

THE word *defence* not being endorsed on the answer, the plaintiff took judgment, as on a Friday cause, in presence of the defendants' counsel, who resisted it on the ground that the cause was not such as could be tried on a Friday, without giving notice.

CAUSES, thus called Friday causes, are defined in the rule of the Parish Court. "Causes on bills "of exchange, promissory notes or other com- "mercial instruments, or on balances of accounts "adjusted between creditor and debtor."

THIS Court is of opinion that the Court below erred in not sustaining the objection, made

by the defendants' counsel and in persisting to consider the present suit, as one of those defined in the rule, and that the defendants were improperly compelled to try the cause, without the regular notice.

THE rule must be confined to the cases detailed and cannot be perhaps extended to similar ones. But the case before us has no similarity, with any of those in the rules. These are cases in which the obligation of the defendant appears on the face of the instrument, which requires no proof except that of its genuineness. Here, the orders of Court give to the plaintiff no claim on the persons or private property of the defendants; they only settle his claim on the estate. His claim on the defendants must be made out by evidence *dehors* these orders, viz. that money sufficient to satisfy the plaintiff has come to the hands of the defendants.

THE judgment of the Court below must therefore be reversed, annulled and made void, and

IT is ordered, adjudged and decreed that the cause be remanded for trial below, with direction to try it as an ordinary cause.

MICHELL vs. *AYME*.

Indorsee must prove the hand of his indorsers.

THIS was an action against the acceptor of a bill of exchange. The plaintiff admitted that the

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bill was his property before the acceptance and that the hand of the drawer was forged. The defendant resisted the payment, because a forged bill is nullity, and what is null can produce no effect. His acceptance, he contended, created no obligation, because it was given in the belief that the bill was a true one; error vitiates every contract. He contended that the drawee could not derive any right from a bill absolutely null and void, and having none, could not transfer any. Lastly, he held the plaintiff could not recover, because the bill being his property before the acceptance, if he sustained a loss, he could not impute it to an error, into which he was led by the defendant.

THE authorities adduced in his defence, were from the Roman, the French, and the Spanish laws, which, he insisted are alone to regulate a contract entered into within the city of New-Orleans.

1. FROM the Roman law, were invoked the well known maxims, *nemo plus ad alium transferre potest quam ipse habet. Non debeo melius conditionis esse quam autor meus, a quo jus in me transit.* No one can transfer a greater right than he has.

Si quis indebitum ignorans solvit, per hanc actionem condicere potest. Dig. lib. 12, *tit. b. l.* 1. *s.* 1.

Quod indebitum per errorem solvitur aut ipsum aut tantumdem repetitur. Id. l. 7. Same principle, *Id. l.* 18. Whatever has been paid through error may be recovered.

2. FROM the French laws, *Domat* was cited, who says, that engagements contracted through error, or without consideration, or upon a false consideration, are null. 1 *Domat*, 126, *liv.* 1, *sect.* 1. *art.* 7.

THE same principle is also found in 1 *Pothier on Obligations.*

THE bearer, who has received the amount of a bill from the drawer, is bound to warrant the genuineness, *garantit la vérité*, of the endorsements and of the bill. *Jousse's Comm. on Ord.* 1673, 249. He who pays a bill, ought to know well the signature of the drawer, otherwise he runs the risk of paying twice; but, he will have his recourse on him who has improperly received the amount. *Id.* 360, 300.

THE defendant next shewed that, from a parere of the merchants of Lyons, given in 1777, it appears that the acceptance of a bill, the signature of which has been discovered to be forged, does not bind the acceptor to pay it. The bearer is obliged to submit to the radiation of the acceptance, and has his recourse against those who have given him the bill. Indeed, the acceptance can only relate to the signature of the drawer. If that be declared a forgery, the acceptance, of which it was

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the foundation, becomes void and gives no right to the bearer. Farther, if the bill had been paid by the acceptor, the bearer would be bound to refund its amount: payment having been obtained on a false title. For it is in an incontestible principle that that which is false, can produce no effect. 1 *Ency. Jurisp.* 90, *Verbo Acceptance.*

THE bearer of a bill warrants the genuineness of it, and of all endorsements. If the drawer, deceived by the forgery of the drawer's signature, has paid it, when the forgery will be discover d, he will cause himself to be repaid by the person, who received the amount of it. Several arrests have decided this. *Masson & Leclerc's Instructions, &c.* 232, *ch.* 18.

3. THE same principle is also established by a Spanish authority. The bearer of a bill absolutely warrants the genuineness of the bill, and of all its endorsements: *es enteramente garante de la validacion de ella, y de todos sus endosos.* 3 *Febrero, add. part.* 1, 375, *n.* 52.

THE plaintiff relied entirely on English and American authorities.

1. THE English are, 1. *Wilkinson* vs. *Lutwitch* (in 1724.) The proof of an acceptance is a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand writing of his correspondent. 1 *Strange*, 648,

but it was said the evidence would not be conclusive.

2. *Jenys* vs. *Fowler & al.* (in 1720.) The defendant offered to prove the bill to be a forgery, by calling persons who were acquainted with the hand of the drawer: but the Chief Justice would not admit this, from the danger to negociable notes, and he strongly inclined to think that even actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee. 2 *Strange*, 946.

3. *Price* vs. *Neal.* If a forged bill be accepted and paid by the drawee, he shall not recover the money back. *Lord Mansfield* said it was incumbent on the plaintiff to be satisfied that the bill drawn upon him, was in the drawer's hand, before he accepted and paid it, but it was not incumbent on the defendant to inquire into it. 3 *Burr*, 1354. 1 *W. Blackst.* 390.

4. *Smith* vs. *Chester*, *Buller*, *J.* said—When a bill is presented for acceptance, the acceptor looks only to the hand-writing of the drawer, which he is afterwards precluded from disputing: and it is on that account that an acceptor is liable even though the bill be forged. *T. R.* 655.

5. *Master* vs. *Miller.* The same Judge quotes this doctrine, as having proceeded from an eminent and learned Judge in another place. "For half "a century there have been various cases, which

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"have left the question of forgery untouched. If "a bill be forged the acceptor is bound." 1 *T. R.* 335.

6. *Jourdan* vs. *Lashbrook* (in 1792) *Lord Kenyon* said, that when the drawer accepts a bill, he admits that the bill was signed by the person, by whom it professes to have been made. *Ashurst J.* said, that bills of exchange are instruments meant, in their nature, for general circulation, and to pass from hand to hand, and every man who puts his name upon them, pledges his faith to the public that all circumstances appearing on the face of them are true. *Lawrence, J.* said an acceptor is only prevented controverting the hand-writing of the drawer, from the mischievous consequences of men giving credit by their acceptances, and then controverting that which must be supposed to be in their knowledge: and this applies to every fact which the acceptance admits. 3 *T. R.* 604.

7. WHEN a bill is drawn payable to a fictitious person, or order, it is in effect a bill payable to bearer, 3 *T. R.* 481.

8. IN the case of *the U. S.* vs. *the Bank of the U. S.* in the Circuit Court of the U. S. for the Pennsylvania District, in October 1800, before Patterson, J. and Peters, J. Ingersoll, for the defendant, admitted and stated that if a man accepts a forged bill, or draft, he is not only conscien-

tiously, but legally bound to pay it; and each of the Judges expressly declared their concurrence in the admission. 4 *Dallas* 235, *in notis*.

9. IN the case of *Levi* vs. *the Bank of the U. S.* in the Supreme Court of Pennsylvania, it was held that the Bank were bound to allow the amount of a forged check presented by the plaintiff and entered to his credit, in his cash book, in the usual form of a deposit of cash, *Id.* 234.

LASTLY. Elementary writers of merit advance the position, that forgery of the drawer's hand is no plea for the acceptor. *Chitty*, 355. *ch.* 4, *Kydd* 302, *ch.* 9.

MATHEWS, J. delivered the opinion of the Court.* The appellant brought suit in the late Superior Court of the Territory of Orleans on a bill of exchange, accepted by the appellee and which he suffered afterwards to be protested for non payment, having discovered it to be a forgery. Judgment was given in favor of Aymé the defendant, and present appellee, in that Court, and being amongst the last rendered before the change from the Territorial to the State Government, a new trial was granted, and the cause regularly transfered for trial to the District Court for the first Judicial District of the State; and from a

*MARTIN, J. did not join in this opinion, having been of counsel in the cause.

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final judgment therein rendered in favor of the appellee this appeal is taken.

THE petition, or declaration, contains only one count and that, such as is customarily used in actions brought by an indorser against the acceptor of a bill of exchange. The answer of the appellee, who was defendant in the Court below, admits his acceptance, but contends that he is not bound to pay, because the bill is not genuine and true, but forged and false, the signatures of the drawers which appear affixed to it being counterfeited and forged. He denies also the signature of the indorser. To this answer the appellant, who was plaintiff in the Court below, demurred, and there being a joinder in demurrer on the part of the defendant, two questions of law were raised for the decision of the Inferior Court, and which must now be decided by this Court, 1st. Is the acceptor of a forged bill of exchange bound to pay it, to the holder, when it does not appear that he took it on the credit of the acceptance and when there is no proof that his situation in relation to it, has been altered by such acceptance? 2d. Can the indorser of a bill recover against the acceptor, without proving the hand writing of the indorsers?

As to the first of these questions, altho' the Court is inclined to think that it ought to be decided in the negative; yet as we have no doubt on the second, that at last a decision of it will carry

the cause in favor of the appellee and affirm the judgment of the District Court, it is deemed unnecessary to give any positive opinion on the legal effects of an acceptance, such as that on which the present action is founded. To determine on the second question it is necessary to examine, whether from the pleadings in the case, and according to the law and custom of merchants the appellant can recover? It is a rule with very few exceptions that an indorsee of a bill of exchange cannot recover against the acceptor, without shewing his right and authority by proving the hand writing of his indorsers. When the bill is indorsed in blank, it is sufficient to prove the signature of the first indorsee. But where there are several indorsements filled up to the order of a number of different persons, in an action against the acceptor perhaps it would be necessary to prove the signatures of all down to the holder. When a bill is made payable to bearer, in an action against the acceptor, commonly the only proof necessary is that of the acceptance.

It is admitted by the counsel for the appellant to be a general rule of the merchants, that in actions brought by indorsees, against the acceptors of bills of exchange, the hand writing of the payees, or indorsers must be proved, in order to warrant a recovery. But he insists that the case before the Court ought to be considered as one forming an exception to this general rule, because

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(says he) the bill being forged the payee must be considered as a fictitious person, and then it stands on the footing of one made payable to bearer? And if this be not true, that the acceptor having made his acceptance whilst all the endorsements were on the bill, no proof of them ought to be required from the holder.

CASES have been decided in the courts of England, and even some which were carried before the Supreme Court of that kingdom, wherein the principle has been established that bills of exchange drawn in favor of fictitious payees, may in some particular instances be considered in the light of those made payable to bearer, and thus form an exception to the general rule which requires proof of the endorsement. From the history of these cases, to enable the holder, of such a bill to recover against the acceptor, as on a bill payable to the bearer, it is necessary, that he should prove, 1. That the payee is fictitious, and 2. That the defendant knew this, at the time when he accepted the bill: or, 1. That the payee is fictitious and, 2. That the defendant had given a general authority to the drawer, &c. to draw bills upon him in the name of fictitious payees. *See Kidd on Bills, &c.* 268. The pleadings do not admit any facts, which bring the appellant's case within either of those exceptions to the general rule, nor can we perceive any other circumstance, attending the cause, which will entitle him to the

benefit of them or any other exception so as to cause the bill on which he founds his action to be considered as one payable to bearer. He can get no relief from the obligation imposed on him, to prove the hand writing of the indorsers, from the circumstance of the indorsements being on the bill at the time of the acceptance. For, altho' it is laid down as a general rule that the acceptor is bound to know the hand writing of his correspondent, the drawer; yet he is supposed to look no farther: and an indorsee who sues him is obliged to make out his right and authority to recover, in the same manner as if the bill had been indorsed after acceptance. *See* 1 *D. & E.* 650, *&c.*

BEING of opinion that the judgment of the District Court is right, and well founded in law and justice, it is not for us to enquire into the axioms and reasoning by which the Judge of that Court supports it.

IT is, therefore, ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs, &c.

ABAT vs. *DOLIOLE.*

When the event of a suit is only to determine to whom a debtor is to pay, he may be a witness.

MARTIN, J. delivered the opinion of the Court. The defendant, who is sued as indorser, alledges that a note of $6,800 was placed in the hands of

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the plaintiff's brother, as a security for his indorsement of the note, on which the suit is brought, of another note indorsed by the defendant also, and of some other notes, indorsed by other persons; that all this was in the plaintiff's knowledge and by him communicated to the defendant.

THAT the maker of the note has since failed, and previous to his failure, means were taken by the plaintiff's brother to withdraw the large note, so as to deprive the defendant of the security it afforded him.

THAT the plaintiff and his said brother are brokers and concerned in this transaction, and that it is by a connivance between them or the real owner of the note in suit (whom the defendant alledges to be some other person than the plaintiff) that he is thus deprived of his security.

ON this, the defendant builds his hope of relief; expecting that the Court will interfere so as to prevent a recovery, or at least the payment of the money over to the plaintiff (if he appears to have connived as is above stated) until the note of $6,800 shall be forthcoming so as to afford the defendant the hope of being thereby secured, as he alledges he ought to.

To establish this connivance he has offered the production of the original, and amended bilan of the maker of the note, stating the amendment was

made by the plaintiff's brother. These papers the Court below refused to admit, and the defendant has thereon taken a bill of exceptions.

We think the Court below properly rejected the papers. As the plaintiff had no agency in the confection or alteration of these papers, they could not be read in evidence against him. The defendant should have shewn that some other than a *blood* relation subsisted between the plaintiff and his brother. The circumstance that the latter held in deposit a note, which was in some manner to secure the payment of that on which the present suit is brought, affording not the least spark of evidence or presumption of a connexion between the two brothers, from which it may be inferred that the act of one of them binds the other.

The defendant next offered the maker of the note as a witness for the same purpose, but the Court rejected him also, as he had no release from his creditors and notwithstanding his *cessio bonorum*, was still bound to pay the note. The defendant excepted to the opinion of the Court.

The witness was certainly an improper witness to prove the payment or extinguishment of the debt arising on the note, and was properly rejected as to that. But he might give evidence of any fact by which the right of the plaintiff or his indorsee might be affected. For the success of either party left the witness in the same obligation to pay the

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note; it being indifferent to him, whether the plaintiff continued, or the defendant became, his creditor.

As the answer alledges a fraud committed by attempting an illegal payment or extinguishment evidently made at a time, when the maker of the note could not effectually change the situation of his affairs, it appears the object of the defendant was rather to shew the fraud, than to establish a payment or extinguishment which could have no effect. But the Court was correct in rejecting him for the same reason as induced the rejection of the papers.

THE defendant farther excepts to the opinion of the Court below, in overruling his exceptions to the plaintiff's answers to his interrogatories.

To the latter branches of the first and third interrogatories there is not any answer, and that to the first branch of the third is very insufficient.

WE think the Court erred in overruling the exceptions of the defendant, in this respect.

THE judgment of the Court below must therefore be and is annulled, reversed and made void and the cause remanded, with directions to sustain the defendant's exceptions to the first and third interrogatories, and to require the plaintiff to put further and more sufficient answers.

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BOURCIER vs. LANUSSE.

Former judgment amended.

Moreau, for the defendant. The question submitted to the Court in this case was whether Madam Bourcier, who sold jointly with her husband several slaves and other property held in common by them, to Paul Lanusse, may cause the sale to be rescinded, on the hypothecary action which she has against the estate of her husband, for the reimbursement of her dowry.

I. THE marriage contract, though it was executed in Louisiana, ought to be regulated by the custom of Paris, to which the parties expressly subjected themselves.

1. GENERALLY the effects of all contracts are settled by the laws and usages of the places where they are executed. *Civil Code* 5, *art.* 10. *Partida* 3, *tit.* 14, *law* 15. *Huberus, translation* 3 *Dallas* 371.

2. BUT this rule receives a limitation, when the parties contemplated another country, than that where the contract was executed. *Huberus ibid* 3. *Dallas* 374.

3. IN marriage contracts the parties are at liberty to make such agreement as they please, even contrary to the laws and usages of the place where they are: provided the said agreement be not repugnant to good morals. *Civil Code* 322, *art.* 1. *Partida* 4, *tit.* 11, *law* 24. *Pothier on com-*

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munity of goods between husband and wife in the preamble of the work, 1 *and* 2 *French Pandectes* 222 *to* 224.

4. PARTIES may even subject their marriage contract to the laws of another country different in its custom, from that where the contract is executed. *Civil Code* 232, 233, *art.* 2, 3, 4. *Pothier, Community of goods, no.* 282, 285 *and* 286, *p.* 335, 338 *and* 339. *French Pandectes* 283 *to* 286. 3 *Discussion on the French Civil Code*, 36 *to* 39.

5. THE Spanish laws are not repugnant to that liberty. *Partida* 4, *tit.* 11, *law* 24.

II. BY the custom of Paris, the wife, who sells some property jointly with her husband, is deemed thereby to have renounced *ipso facto* to her right of mortgage on the thing sold, and she could not afterwards attack the sale, under the pretence that her husband had left no property to reimburse her dowry. *Jousse in his commentaries on the Custom of Paris. See his notes on the* 232 *art. of that Custom. vol.* 2, *p.* 52 *and* 53. *French Pandectes, num.* 159 *and* 163, *p.* 193, 194, 199 *and* 200.

III. BY the Spanish laws the express renunciation of the wife, to her right of mortgage, was only required when a sale was made by the husband of

his own private property or of the dotal property or paraphernalia of his wife.

Not a word of the sale of the property held in common. Not a word of the sale that was made by the wife jointly with her husband. 1 *Febrero Juicios, book 1st chap.* 3, § 1, *number* 40, 41, 46 *and* 48, *p.* 197, 200 *and* 201. 2 *Febrero Contratos, chap.* 4, § 4, *num.* 12, *p.* 114.

But by the Civil Code the Spanish law was in some degree altered.

The wife cannot alienate her private property, but with the consent or authority of her husband. *Civil Code*, 29, *art.* 39.

The wife may sell her paraphernalia with the authority of her husband: in such sale, what would be the necessity of a renunciation on the part of the wife? *Civil Code*, 335, *art.* 58.

The wife could not bind herself jointly with her husband by the Spanish law, except as far as she had been benefited thereby. By the civil law it seems that the wife now may, since the Civil Code grants her a mortgage for her indemnity with respect to those obligations. *Civil Code* 333, *art.* 53, *num.* 3. 2 *Febrero Contratos, number* 114, *p.* 105.

IV. Supposing the renunciation be necessary, Madam Bourcier, must act against the purchaser or possessor of the plantation sold by her husband

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during the marriage, since she has not consented to that sale.

V. At any rate Mad. Bourcier is bound to act at first against a sale made by her husband, of a plantation, during marriage to which she gave no assent.

VI. According to *Febrero*, the renunciation of the wife in case of the sale, even of a dotal estate, must be made in the same form as in cases in which she bound herself as surety for her husband, or *in solido* with him. 1 *Febrero Juicios, ch.* 3, § 1, *p.* 392. *Contratos, ch.* 4, § 4, *num.* 115 & 117.

Livingston, for the plaintiff, declined any argument.

By the Court. The former judgment requires but a small alteration: and the Court amend it,

It is further ordered, adjudged and decreed, that the real property and slaves, bought by the defendant, from the plaintiff's husband, be sold to make the sum of four thousand dollars due to her, with legal interest since the date of the judicial demand and costs of suit: legal notice being given to third possessors, if any there be.

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The office of special administrator is legal and is not abolished.

THE plaintiff brought suit as special administrator and the defendant denied the legal existence of such an officer.

Morse, for the plaintiff. It is unnecessary to enquire whether the office of special administrator existed under the French and Spanish governments, before the occupation of this country by the United States. Yet, if it existed, the Governor-General and Intendant had the power of filling it, and this power passed undoubtedly to the person who made the ordinance. Admitting that the power did not exist, still it was the duty of the United States to provide for the preservation of the rights of absent heirs and in discharge of that duty, the ordinance was issued.

BY the act of congress, passed to enable the President of the United States to take possession of this country, it is provided that all the military, civil and judicial powers exercised by the officers of the Spanish government shall be exercised in such a manner, and shall be vested in such person or persons, as the President of the United States shall direct.

IN pursuance of this act, the President of the United States issued a commission to the then Governor of the Mississippi Territory, authorising him to execute within the ceded territories,

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all the powers and authorities exercised by the Governor and Intendant thereof, except that of laying new taxes and granting land.

VESTED with such powers, this officer, within a few days after his arrival, passed ordinances for licencing retail dealers; for incorporating the Bank of Louisiana, the ordinance under consideration and one for establishing a court for the trial of causes. These acts of authority, no doubt, met the eye of the government of the U. States and were neither disapproved nor disowned. The office, therefore, had once a legal existence, and

IT never was abolished. It is true the Civil Code, 172, authorises Parish Judges to appoint curators to vacant estates; it is a fixed principle of law that no office can be abolished by implication, neither can a statute while it can stand with that which apparently repeals it. The Court will sustain two offices, if they can possibly stand together, 6 *Bacon*, 373. A repeal by implication shall not be allowed: acts seemingly repugnant shall, if possible stand.

THE office of the special administrator, and that of a curator to a vacant estate are distinct, and the powers of the one quite different from those of the other. The special administrator is restricted, he can only interfere with the estates of transient persons, who have resided less than two years within the city of New-Orleans: his powers ex-

pire on the appointment of an administrator, and since the Civil Code on that of a curator: he has nothing to do with real property. His office has been recognised by the legislature, since the promulgation of the Civil Code, 1809, *ch.* 4, *sec.* 5, and suits have been brought since and sustained in the Superior Court of the late territory.

Depeyster, for the defendant. The act of congress of the 31st of October 1803, was the one under which the Governor was acting, when he issued the ordinance, under consideration. This instrument bears date of the 7th of September following, and although at that time the act of the 26th of March had passed, yet by the last clause of it the former act had been continued till the 1st of October following. So, it is from the first act that the authority is to be derived.

THIS act speaks of the military, civil and judicial powers exercised by the officers of the existing government. These powers were to be vested and exercised in such a manner as the President should direct. His commission requires his grantee to exercise his powers *according to law*. Those, therefore, who support this ordinance ought to shew us the law of Spain, under which the officer who issued it was authorised to act.

HIS were the power of a Governor and Intendant. The first officer in the Spanish colonies is

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the military chief, he presides in the Cabildo, in the body in which was vested the power of making local regulations. He was vested with judicial authority both appellate and original; he had power of granting vacant land, though this was at time shared with the Intendant and it is believed lately was the province of the latter.

IT is true the history of the country, under the domination of Spain, affords glaring instances of the exercise of supreme, nay despotic power, by the Governor-General. The abolition of the sovereign council which existed, under the French government by O'Reilly, the erection of the Cabildo, and the promulgation of part of the Spanish laws by the same officer, evince that he had other than executive powers. But, in the preamble of the instruments, by which these acts of authority were announced, reference is made to special powers granted by the King, from which it clearly appears that the ordinary functions of a Governor did not extend to them.

LASTLY, if the office had ever a legal existence it was abrogated by the Civil Code which transmits all the powers of the special administrator to other hands. *Civil Code*, 172.

MARTIN, J. delivered the opinion of the Court. Two questions present themselves for the decision of this Court.

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1. Did the office of special administrator, claimed by the plaintiff ever exist?

2. If it did, was it afterwards abrogated by any subsequent law?

1. It is said it never existed for offices cannot be created in any other manner than by law, and the person, who issued the ordinance creating this, had no legislative power.

It is not easy for us to determine what were the legitimate powers of a Governor-General and Intendant of the Spanish province of Louisiana. It is clear, that some of the persons who filled that office exercised legislative power. The extent of the authority of that officer was certainly often enlarged by instructions from the crown and the limits of it which perhaps were never accurately defined in practice, cannot at the present time be with facility discerned. The President of the U. S. seems to have believed that the commission he granted to the then Governor of the Mississippi Territory, vesting him with the powers of Governor-General and Intendant of Louisiana, clothed the grantee with some legislative authority, since he excepted the right of taxation from the grant. The grantee, issuing the ordinance creating the office, construed his commission as extending to the exercise of legislative authority in this and some other instances, in which he was not censured; the Superior Court of the late territory si-

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lently sanctioned his conduct by sustaining suits and giving judgments in favor of the officer and the legislature, as late as in 1809, imposed certain duties on him. Till the institution of the present suit, during the whole territorial government, no doubt appears to have been entertained of the constitutional and legal existence of the office. Many estates, some of great value, have been settled by the special administrator. It would be attended with monstrous inconveniencies, if by declaring that the office never legally existed the Court was to annul all the transactions of the various incumbents who have filled it.

WHEN in the case of *Stuart vs. Laird*, 1 *Cranch* 309, a judgment was sought to be reversed, on the ground that the Judges of the Supreme Court of the U. States had no right to sit as circuit judges, not being appointed as such: or in other words that they ought to have distinct commissions for that purpose; that Court thought it sufficient to observe that practice and acquiescence for a period of several years, commencing with the organisation of the judicial system, afforded an irresistible answer, and had indeed fixed the construction; that it was a cotemporary interpretation of the most forcible nature, and this practical exposition was too strong and too obstinate, to be shaken or controlled, they concluded that the question was now at rest and ought not now to be disturbed. Here practice has fixed the proper construction of

the powers of the officer who issued the ordinance; the judicial and legislative authorities of the late government have sanctioned the construction. *Optima legum interpres consuetudo.* If it was an erroneous one, it is the case to say *communis error facit jus.* It began with the organisation of the American government here; the question is to be considered now as at rest, and ought not to be disturbed.

II. The power and duty of the officer were confined to the estates of persons dying in the city of New-Orleans, without having a residence of two years, leaving neither lineal relations, nor collateral ones of the first degree, nor husband or wife.

Some months after the creation of the office, courts of probates making a general provision for the administration of the property of intestates, were established by the legislative council in 1805. This was never held to interfere with the duties of the special administrator, whose office it was to secure the property till the appointment of an administrator.

In 1808, the Civil Code was published. This act purports to be a digest of the law, theretofore in force; a declaratory act. The person, who, according to it is to attend to the estate of an intestate, in the absence of the next of kin is called a curator. The expression of the civil law corres-

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ponding to that of the English or American law; *administrator*.

We conclude that neither the act of the legislative council, nor the Civil Code have repealed the ordinance under consideration.

A general provision does not repeal a particular one by *implication*. If a particular thing be given or limited in the preceding part of a statute, this shall not be altered or taken away by subsequent *general* words of the same statute. 6 *Bacon's Abr.* 231, *verbo Statute. Stanton* vs. *Univ. of Oxford*, 1 *Jones*, 26. In this case, the provision was not in the same statute, but it was in one *in pari materiâ* and all such are to be taken as if they were *one*. *Douglas*, 30.

Unless the ordinance cannot exist with the Civil Code, it must be holden unrepealed. Now, the duties it imposes are not more at war with the provisions of the Civil Code, than with the act of the legislative council. We conclude it is not repealed.

The judgment of the District Court must therefore be annulled and reversed, and the cause must be remanded thither with directions to proceed to the trial.

MAYOR &c. OF N. ORLEANS vs. CASTERES.

The city of New-Orleans derive no title from Congress to land not part of the commons

MATHEWS, J. delivered the opinion of the Court. The plaintiffs and appellees, in this suit, claim title to a certain lot of ground situated on the Bayou Road, as being a part of the commons of the city, to which their claim has been recognized and confirmed by an act of congress, entitled an act, &c. 8 *Laws U. S.* 303.

FROM the tenor of the petition it appears to be a petitory action, in which to entitle them to recover, they must shew a right and title in themselves, not only against the appellant but all other persons; in other words they must gain by the strength of their own title and not by the weakness of their adversary.

THE difficulties under which the Corporation labours, in ascertaining their right, and particularly the extent of their claim to the commons of the city, we have heretofore had occasion to witness.

THE U. States, by the act of congress above alluded to, have clearly recognized the title of the city to commons adjacent to it and within 600 yards from its fortifications, and confirmed said title, under a proviso which it is not here necessary to notice. Whether this act be viewed as making an original grant and concession, or as a confirmation of an ancient right and claim, by which the United States have relinquished all pretensions, to the property therein mentioned, and

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vested a complete title in the city; it appears to us that a fair construction of it will confirm the claim of the Corporation, under it, to such lands alone adjacent to the city, as were commons at the time of passing the act and had been previously such, and that any right, title or claim which the United States may have to real property within the limits from the fortifications, prescribed by the act, other than the commons, does not by this grant, or recognition and confirmation, pass to the city.

As the appellees claim under this act of congress, it now becomes necessary to examine whether there is any thing in the evidence or statement of facts, which shews the lot, the subject of the present contest, to be of that description of property, embraced by the words and meaning of the law. At the time of passing the act cited, was it land belonging to the domain of the United States, subject to the right of commons of the city of New-Orleans, or was it held by the general government as a property separate and distinct from those commons? It is evident, from the facts in the cause that the lot of ground to which the city corporation claims title, in the present suit, and of which they pray to be maintained in their possession and property, did not at the time, when Louisiana was ceded to the United States, nor at the period when the act of congress was passed, make a part of the commons of the city. On the contrary it is stated expressly, to be a

part of a plantation belonging, first to Mde. Delavillier, who sold it to Mde. de Morant, this last to Moreau, who sold it to Nemengues; from whom it was taken, in the year 1792 by the Baron de Carondelet, for the use of the fortifications, on giving him an indemnification.

Now as the lot was not a part of the commons at the time of passing the act of congress, under which the appellees claim, they have derived no title from it. They have made out no satisfactory title in any other way and consequenty have no right to recover.

It is, therefore, ordered, adjudged and decreed that the judgment of the Parish Court be reversed and annulled; and this Court proceeding here to give such judgment as ought there to have been given, do further order and decree that judgment be rendered for the appellant, with costs of suit.